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Item 3 of the provisional agenda

CONSIDERATION OF THE POSSIBLE REVIEW OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952

Consideration of the review of the 1952 Convention on Arrest of Sea-Going Ships

Note by the UNCTAD secretariat

The attached report (JIGE(VII)/2)* has been prepared for the seventh session of the Joint Intergovernmental Group, in response to the recommendation of the UN/IMO Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages.

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UNCTAD/IMO

JIGE(VII)/2

Joint Intergovernmental
Group of Experts on Maritime Liens
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CONSIDERATION OF THE REVIEW OF THE 1952 CONVENTION ON ARREST OF SEA-GOING SHIPS

Note by the secretariats of UNCTAD and IMO

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I. BACKGROUND AND INTRODUCTION

1. The Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects was established jointly by the United Nations Conference on Trade and Development (UNCTAD) and the International Maritime Organization (IMO). 1/ The mandate of the Joint Intergovernmental Group of Experts (JIGE), as approved by the two organizations, included the possible consideration of "the review of the maritime liens and mortgages Conventions and related enforcement procedures, such as arrest".

2. The JIGE, at its sixth session, having completed the final reading of the draft articles for a convention on maritime liens and mortgages, also held an exchange of views concerning the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952 (hereinafter referred to as the Arrest Convention). The JIGE had before it a document prepared by the secretariats entitled "Consideration of the Scope of the Revision of the International Convention Relating to the Arrest of Sea-going Ships, signed at Brussels on 10 May 1952". The JIGE agreed that it might be necessary to amend the Arrest Convention in the light of the decisions taken in respect of the draft maritime liens and mortgages convention. It was, however, considered that, in view of the close relationship between the two Conventions, preparation of any amendment of the Arrest Convention had to be postponed until after the adoption of the Convention on Maritime Liens and Mortgages by a diplomatic Conference. 3/

3. In May 1993, the United Nations/IMO Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages, having adopted the International Convention on Maritime Liens and Mortgages, 1993, adopted a resolution in which it recommended that "the relevant bodies of UNCTAD and IMO, in the light of the outcome of the Conference, reconvene the Joint Intergovernmental Group with a view to examining the possible review of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952, and invite the secretariats of UNCTAD and IMO,

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1/ See resolution 6(XI) of the UNCTAD Working Group on International Shipping Legislation, endorsed by the UNCTAD Trade and Development Board at its thirty-second session and by the IMO Council at its fifty-sixth session.

2/ Document JIGE(VI)/3 issued by UNCTAD under cover of TD/B/C.4/AC.8/22 and by IMO under cover of LEG/MLM/22.

3/ For the recommendation of the Joint Group, see the final report of the JIGE, document JIGE(VI)/8, TD/B/C.4/AC.8/27, LEG/MLM/27, para 16.

in consultation with relevant non-governmental organizations, such as the Comité Maritime International, to prepare the necessary documentation for the meetings of the Group". 4/

4. The recommendations contained in the resolution were endorsed by the UNCTAD Trade and Development Board at its fourth (pre-sessional) Executive Session and by the IMO Assembly at its eighteenth session.

5. This note has been prepared by the UNCTAD and IMO secretariats, in consultation with the CMI, in response to the above resolution. It attempts to update the study contained in document JIGE(VI)/3 (TD/B/C.4/AC.8/22 - LEG/MLM/22) concerning the scope of the revision of the Arrest Convention 1952. It highlights, inter alia, some of the changes to the Arrest Convention which might be necessary as a result of the adoption of the International Convention on Maritime Liens and Mortgages, 1993.

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4/ See the report of the UN/IMO Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages (A/CONF.162/8), annex I.

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II. OUTLINE OF POSSIBLE MODIFICATIONS TO THE 1952 CONVENTION ON ARREST OF SEA-GOING SHIPS

A. Article 1 - Claims in respect of which a vessel may be arrested

6. More detailed discussion concerning the amendments which might be desirable in respect of Article 1 is contained in the previous report of the UNCTAD and IMO secretariats on the subject (JIGE(VI)/3). 5/ This note focuses on the changes which might be required in the light of the adoption of the new International Convention on Maritime Liens and Mortgages, 1993.

7. Article 1 of the Convention provides for a list of maritime claims which give rise to a right of arrest. Article 1 has often been criticized as being incomplete and outdated. 6/ Suggestions have been made to extend the list to include other maritime claims such as claims for unpaid insurance premiums, stevedoring charges, agency fees, etc., or alternatively that some general wording should be devised to allow arrest for all claims in connection with the operation, ownership and management of a ship. 7/

8. The approach adopted by the Arrest Convention would probably be in conflict with Article 6 of the International Convention on Maritime Liens and Mortgages, 1993 (hereinafter referred to as the 1993 MLM Convention). According to Article 6, States Parties may, under national law, grant other maritime liens on a vessel to secure claims other than those provided for in Article 4. It is therefore conceivable that the law of a State Party to the 1993 MLM Convention, which grants maritime liens other than those listed in Article 4(1), be applied in a State Party to the Arrest Convention and that

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5/ Consideration of the Scope of the Revision of the International Convention Relating to the Arrest of Sea-going Ships, signed at Brussels on 10 May 1952, document JIGE(VI)/3, TD/B/C.4/AC.8/22, LEG/MLM/22, (hereinafter referred to as JIGE(VI)/3), pp 5-9.

6/ See JIGE(VI)/3, p 6: Berlingieri on Arrest of Ships, A Commentary on the 1952 Arrest Convention, published under the auspices of the CMI, Lloyd's of London Press Ltd, 1992, p 51: "In general, a closed list is dangerous, for it is unlikely to be complete or, in any event to continue to be complete in the light of new developments".

7/ See JIGE(VI)/3, p 6; summary of the debates at the CMI Lisbon Conference, Lisboa II, 1985, pp 126-127.

maritime liens under the 1993 MLM Convention and the fact that they are subject to a short extinction rule, provide a further argument in favour of inclusion of a general wording within the list of maritime claims.

9. The CMI Draft Revision of the 1952 Arrest Convention (hereinafter referred to as the CMI Draft), adopted a mixed approach providing for definition of the term "maritime claim", together with general words which are followed by an extended list of maritime claims as examples. The opening sentence of Article 1, paragraph (1) provides:

> "(1) 'Maritime claim' means any claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or out of a mortgage or a 'hypothèque' or a charge of the same nature on any ship, or out of salvage operations relating to any ship, such as any claim in respect of ..."

10. The term "such as" is used in order to introduce an element of ejusdem generis and to limit maritime claims to those similar to the categories exemplified in the list of claims. The proposal to replace the list by a general clause covering all claims in connection with the ownership, operation and management of a ship was not accepted. It was considered that a general clause would give rise to different interpretations in different countries and would not ensure uniformity. 8/

11. The terminology used in Article 1(1) differs from that of the 1993 MLM Convention. 9/ Consequently, there may be claims which are granted maritime lien status but remain outside the Arrest Convention. The terminology used in the Arrest Convention in respect of claims with maritime lien status should, in so far as possible, be closely aligned with, or identical to, that of the 1993 MLM Convention.

12. Article 1(1)(a) covers "damage caused by the ship, whether in collision or otherwise". This provision may be compared with that of Article 4, paragraph 1(e) of the 1993 MLM Convention. It may be necessary to consider whether the words "or otherwise" are sufficiently clear and include all types of claims covered by Article 4, paragraph 1(e) of the 1993 MLM Convention.

8/ See CMI, Lisboa II, 1985, pp 126-128.

9/ See Article 4(1) of the 1993 MLM Convention, A/CONF.162/7.

It should also be noted that the provision of Article 1(1)(a) of the Arrest Convention is not limited to tort claims but also includes contractual claims. Article 1(1)(a) of the Arrest Convention has been reproduced in the CMI Draft.

13. Article 1(1)(b) of the Arrest Convention and Article 4(1)(b) of the 1993 MLM Convention deal with claims in respect of loss of life and personal injury. The provision of the latter Convention, however, also includes the words "whether on land or on water". It would be advisable to use the same wording in the Arrest Convention, especially bearing in mind that Article 4(1)(b) is not limited to tort claims. The term "whether on land or on water" is not included in the CMI Draft. 10/

14. Article 1(1)(c) includes claims in respect of "salvage". Article 4(1)(c) of the 1993 MLM Convention grants maritime lien status to "claims for reward for the salvage of the vessel". This was to exclude the special compensation provided for in Article 14 of the 1989 Salvage Convention. It may be desirable to make a similar amendment in the Arrest Convention. 11/ In the CMI Draft the term "salvage operations or any salvage agreement" is used. 12/

15. Article 1(1)(m) permits arrest only in respect of claims for "wages of masters, officers or crew". Article 4(1)(a) of the 1993 MLM Convention, however, recognizes maritime liens in respect of "claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf". The latter provision is much more clear in that it (i) makes specific reference to sums other than wages due to the master, etc; (ii) replaces the word "crew" with the term "other members of the vessel's complement" so as to include claims of those who, although working on board ship, may not be qualified as members of the crew; (iii) includes costs of repatriation and social insurance contributions payable on their behalf. This removes all controversy as to whether or not social insurance contributions and costs of repatriation would be covered by the term "wages".

10/ Article 1(1)(b).

11/ See also Article 7(1)(e).

12/ Article 1(1)(c).

16. The CMI Draft uses similar wording to that of the 1993 MLM Convention except that no reference is made to the costs of repatriation. Such omission may not be significant, since the list of maritime claims in the CMI Draft is open-ended. 13/

17. Consideration may be given to amending the wording of Article 1(1)(m) of the Arrest Convention to bring it into line with that of the 1993 MLM Convention.

18. Article 1(1)(q) of the Arrest Convention includes claims arising out of "the mortgage or hypothecation of any ship" within the list of maritime claims. 14/ The wording used in the 1993 MLM Convention is "mortgages, 'hypothèque' and registrable charges of the same nature". The wording used in the CMI Draft is identical to that of the 1993 MLM Convention. 15/

19. It is advisable to use the same wording in the Arrest Convention so as to allow the holders of registrable charges of the same nature as the mortgage or hypothèque to arrest the ship in respect of claims arising from such charges. Furthermore, the word "hypothecation" should be replaced with the term "hypothèque", as the former has a different meaning under English law and is used in relation to bottomry bond and respondentia. 16/

20. In view of the above the JIGE may wish to consider what amendments would be required to Article 1 of the Arrest Convention, taking account of the adoption of the 1993 MLM Convention.

B. Article 2 - Powers of arrest

21. Article 2 permits arrest only for maritime claims. It sets out the principal rule of the Convention that ships flying the flag of a Contracting State may be arrested in the jurisdiction of another Contracting State only in respect of a maritime claim but in respect of no other claim. This provision

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13/ Article 1(1)(o).

14/ See also Article 7(1)(f).

15/ Article 1(1)(u).

16/ See document JIGE(VI)/3, TD/B/C.4/AC.8/22, LEG/MLM/22, p 7; see also Berlingieri on Arrest of Ships, op cit, pp 72-73.

stresses the need for inclusion of all maritime liens within the list of maritime claims, since the arrest is, together with the seizure, the only means of preventing the extinction of maritime liens.

22. In this context consideration should be given to Article 6 of the 1993 MLM Convention, which permits States Parties to grant in their national law other maritime liens to secure claims other than those set out in Article 4 of the Convention. It should be considered whether rights of the holders of such national liens need protection by allowing them the right of arrest for their claims. If so, it should further be considered whether adopting some general wording together with an extended list of maritime claims would provide an appropriate solution. The CMI Draft solves the problem by providing for an open-ended list of maritime claims in Article 1.

C. Article 3 - Vessels that may be arrested

23. Paragraphs 1 and 4 of Article 3, which contain provisions regarding vessels that may be arrested in respect of a maritime claim, 17/ have been the subject of detailed discussion in the secretariats' previous document JIGE(VI)/3. 18/ The document considered aspects of paragraphs 1 and 4 of

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17/ Paragraph 1 of Article 3 provides:

"Subject to the provisions of paragraph (4) of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which maritime claim arose, or any other ship which is owned by the person who was, at the time when maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose may be arrested in respect of any of the maritime claims enumerated in Article 1(1)(o), (p) or (q)."

Paragraph (4) reads:

"When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such claims.

"The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship".

18/ See pp 9-15.

Article 3 which gave rise to varying interpretation and controversy, including the fact that it was not entirely clear from the wording of these paragraphs whether or not personal liability of the owner was essential for the purpose of arrest under the Convention. The document also considered the approach adopted by the CMI Draft in attempting to resolve some of he ambiguities which were considered to exist in relation to the subject.

24. Document JIGE(VI)/3 proposed the following questions for consideration by the Joint Group:

(a) Whether it was deemed appropriate to limit the right of arrest in respect of claims not secured by maritime liens to a ship owned by the person liable;

(b) If so, whether Article 3 of the 1952 Convention was considered sufficiently clear, or likely to be construed so as to allow the arrest of a ship not owned by the person liable even in respect of claims which are not secured by maritime liens;

(c) Whether, on the assumption that the right of arrest of a ship not owned by the person liable is limited to claims secured by maritime liens, such liens should only be those recognized by the Maritime Liens and Mortgages Convention, or also include the national maritime liens under the applicable law;

(d) If Article 3 of the 1952 Convention is not considered satisfactory, whether the solution adopted by the CMI Draft is considered as satisfactory. 19/

25. The above questions are still valid in relation to the 1993 MLM Convention. A question which may require specific consideration in the adoption of the 1993 MLM Convention is whether it would be advisable to align the text of Article 3, paragraph 4 with that of the opening sentence of Article 4, paragraph 1 of the 1993 MLM Convention.

26. Article 4(1) of the 1993 MLM Convention provides that claims set out therein against the owner, demise charterer, manager or operator of the vessel are secured by a maritime lien on the vessel. Thus, unlike the

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19/ See ibid, pp 14-15.

1967 Convention, 20/ claims against the time charterer or voyage charterer are not secured by a maritime lien under the 1993 MLM Convention. Such claims, however, would give rise to a right of arrest under Article 3, paragraph (4) of the Arrest Convention. The provisions of Article 3, paragraph (4), which allow arrest of a vessel as security for claims against the demise charterer, further provide that the aforesaid provisions also apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

27. Attempts have been made to place a more restrictive interpretation on Article 3(4) so as to avoid a situation whereby a vessel can be arrested in a Contracting State but the underlying claim can not be enforced against that vessel. It is therefore submitted that arrest can only be lawfully made if under the applicable law the claim may be enforced against that vessel. 21/

28. The CMI Draft overcomes the problem by expressly granting the right of arrest in respect of all claims secured by a maritime lien. 22/

D. Article 3(3) - Right of rearrest

29. Paragraph 3 of Article 3 has been discussed in document JIGE(VI)/3. 23/ The JIGE has been invited to consider whether the approach adopted by the Arrest Convention, whereby a second arrest of a vessel in respect of the same maritime claim by the same claimant is not permitted, is satisfactory, or whether it would be desirable to provide for the possibilities of rearrest and multiple arrest under certain conditions. It does not call for any further comment.

20/ Article 7.

21/ See A Philip, "Maritime Jurisdiction in the EEC", Acta Scandinavia Juris Gentium, 1977, pp 113-118; document JIGE(VI)/3, p 12; Berlingieri on Arrest of Ships, op cit, p 99; see also the CMI Draft, Article 3(3).

22/ See Article 3(1).

23/ See pp 15-17.

E. Article 6 - Wrongful arrest

30. Article 6 and questions relating to the provision of security and liability for loss or damage caused by wrongful arrest were considered in the secretariats' previous report. 24/ The JIGE was invited to consider whether it was desirable to include within the Convention (i) provisions requiring the Court to make the arrest conditional upon the provisions of security by the claimant, possibly with some exceptions, for example, in cases of arrest by seamen in preserving a maritime lien for wages; (ii) express provisions on liability for loss or damage caused by wrongful and unjustified arrest. 25/

31. If the JIGE deems it appropriate to include provisions in the Convention concerning the provision of security in respect of certain claims, then it may also wish to give further consideration to providing some guidelines as to the manner in which such security may be granted: for example, the nature of the security, the manner of calculation and issues which should be taken into account such as the amount of the claim, loss of time or earnings to the shipowner, etc. Such provisions would be valuable in encouraging uniformity in implementation.

F. Article 7 - Jurisdiction on the merits of the case

32. Document JIGE/VI)/3 considered Article 7 of the Arrest Convention and the fact that it grants jurisdiction on the merits of the case to the Courts of the country within which arrest is made in a limited number of cases (which may be considered arbitrary) where such jurisdiction does not exist under the lex fori. 26/ It also considered the approach adopted by the CMI whereby jurisdiction is granted to the Courts of the forum arresti to determine the case upon its merits unless the parties agree otherwise or where the Court refuses to exercise its jurisdiction and that refusal is permitted by the lex fori and a Court of another country accepts jurisdiction. 27/

24/ JIGE(VI)/3, pp 17-18.

25/ JIGE/VI)/3, p 18.

26/ See pp 18-20.

27/ Article 7 of the CMI Draft.

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33. The JIGE may wish to consider whether the 1952 Convention's approach of providing for a list of a limited number of cases is satisfactory; or whether it would be more appropriate to grant general jurisdiction to the Courts of the country where the ship is arrested to determine the case upon its merits. 28/

G. Article 8(2) - Application to ships of non-Contracting States

34. According to paragraph 2 of Article 8, "a ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest."

35. Thus, under paragraph 2 of Article 8, ships flying the flag of non-Contracting States may be arrested not only in respect of maritime claims listed in Article 1, but also for any claim provided such arrest is permitted under lex fori. It is not, however, clear from the terminology used whether all the provisions of the Convention, except Article 2 (i.e., limiting right of arrest only to maritime claims), are to apply to ships of non-Contracting States, or whether it is only the right of arrest in respect of maritime claims and not the whole Convention, which is to apply to such ships. While the wording of Article 8(2) seems to support the latter view, it is submitted that the former is supported by the Travaux Préparatoires. 29/

36. The approach adopted by the CMI Draft is to provide for application of the whole Convention to "any sea-going ship, whether or not that ship is flying the flag of a State Party." 30/ However, it also provides that States may reserve the right not to apply the Convention to ships of non-Contracting States. 31/

28/ For further information on the subject, see Berlingieri on Arrest of Ships, op cit, pp 166-170.

29/ See Berlingieri on Arrest of Ships, op cit, pp 22-23.

30/ Article 8(1).

31/ Article 9.

37. The Joint Group may wish to consider whether the present text of Article 8 is satisfactory, or whether it would be appropriate, in line with more modern maritime Conventions and the 1993 MLM Convention, 32/ to provide for general application of the whole Convention whether or not the ship is flying the flag of a State Party.

H. Article 9 - No further maritime lien

38. The second part of Article 9 expressly provided that the Convention does not create "any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable." At the time of the adoption of the Arrest Convention in 1952, reference to "the Convention on Maritime Mortgages and Liens" could only be to the 1926 International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages. With the existence of three Conventions on maritime liens and mortgages, this provision would therefore need to be amended. The CMI Draft solves the problem by simply providing that nothing in the Convention shall be construed as creating a maritime lien. 33/

39. Furthermore, consideration may also need to be given to aligning the terminology in the English and French texts of Article 9 where in the English text the term "any maritime liens" is used and in the French version the words "aucun droit de suite".

32/ Article 13.

33/ Article 8(3).

III. CONCLUDING REMARKS

40. This note provides a brief update to the UNCTAD and IMO secretariats' previous report entitled "Consideration of the Scope of the Revision of the International Convention Relating to the Arrest of Sea-going Ships, signed at Brussels on 10 May 1952", 34/ which will also be before the Joint Intergovernmental Group. The note focuses, inter alia, on the amendments to the 1952 Arrest Convention which might be required as a result of the adoption of the International Convention on Maritime Liens and Mortgages, 1993.

41. The Joint Intergovernmental Group may wish to take a decision on the scope of the revision of the 1952 Arrest Convention. It may wish to consider whether a thorough revision of the Convention is desirable in order to clarify any ambiguity which may be considered to exist, giving rise to varying interpretation. It may, on the other hand, decide to limit the scope of the revision to mere drafting amendments consequential upon the adoption of the 1993 MLM Convention. The latter course of action, however, would still require substantive decisions in relation to national maritime liens granted under Article 6 of the 1993 MLM Convention. The 1926 and 1967 Conventions do not contain any reference to other maritime liens which may be granted by States Parties under national law. Thus, the impact of such liens in relation to the Arrest Convention has never been considered before. The Joint Group may therefore wish to consider whether paragraph (1) of Article 1 may be amended in order to permit arrest in relation to national maritime liens, and thus to provide a certain protection to holders of such liens, bearing in mind the short extinction period provided in the Convention.

34/ Document JIGE/VI)/3.